APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED OCTOBER 4, 2001

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 00-3753 and 00-3879

JANET GREENWELL,
Plaintiff, Cross-Appellant,

v.

AZTAR INDIANA GAMING CORPORATION,
doing business as Aztar Casino,

Defendant, Third-Party Plaintiff/Appellant, Cross-Appellant,

v.

MATTHEW B. KERN and GREGORY J. LOOMIS,

Third-Party Defendants/Appellees.

Appeals from the United States District Court
for the Southern District of Indiana, Evansville Division.
No. 98 C 211 — **Richard L. Young**, *Judge*

ARGUED JUNE 6, 2001 — DECIDED OCTOBER 4, 2001

Appendix A

POSNER, *Circuit Judge*. We have a three-cornered dispute that raises a tangle of jurisdictional and procedural issues. The plaintiff, Greenwell, suffered back pain while walking in a casino boat on which she was employed by the owner, Aztar. (On the origins and popularity of modern riverboat gambling, see Lori Chapman, "Riverboat Gambling in the Great Lakes Region: A Pot of Gold at the End of the Rainbow or Merely 'Fool's Gold?,' " 26 *U. Toledo L. Rev.* 387, 390-91 (1995); Ronald J. Rychlak, "The Introduction of Casino Gambling: Public Policy and the Law," 64 *Miss. L.J.* 291, 309 (1995).) The boat was afloat on a navigable waterway of the United States in Indiana. Aztar referred Greenwell to two doctors, Kern and Loomis, who operated on her back — negligently, she claims. Yet her suit, which charges both a work-related injury to her back and medical malpractice and related torts in the treatment of the injury, is not against the doctors but against Aztar. Aztar, however has impleaded the doctors, contending that they are the primary wrongdoers.

Greenwell bases federal jurisdiction primarily on the Jones Act, which applies the principles of the FELA to maritime workers, 46 U.S.C. App. § 688(a); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Weibrecht v. Southern Illinois Transfer, Inc.*, 241 F.3d 875, 877 (7th Cir. 2001); *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257, 266 (2d Cir. 1963), and on the admiralty doctrine of maintenance and cure, which requires a seaman's employer to provide food, lodging, and — what is relevant here — medical services to a seaman injured while employed on the ship. *Lewis v. Lewis & Clark Marine, Inc.*, 121 S.Ct. 993, 997 (2001); *Galveston County Navigation District No. 1 v.*

Hopson Towing Co., 92 F.3d 353, 357 n. 8 (5th Cir. 1996); *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670, 679 (2d Cir. 1971). The seaman is unlikely to have an alternative source of maintenance and cure when at sea; the doctrine thus formalizes and makes mandatory what, in its absence, would probably be a contractual undertaking by the employer. Cf. *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 730 (1943); *Silmon v. Can Do II, Inc.*, 89 F.3d 240, 242 (5th Cir. 1996). The duty is nonwaivable, perhaps out of fear of duress against seamen who are injured, or fall sick, far from land, and so are at the mercy of their employer.

Had Greenwell's back pain been caused by an injury sustained at work, as she originally charged, and had the malpractice in treating her been committed by a doctor employed by Aztar, her employer, Aztar would have been liable in accordance with standard principles of respondeat superior. It would have been liable under both the Jones Act and the doctrine of maintenance and cure, because the malpractice would have been committed by a fellow employee acting within the scope of his employment. *De Zon v. American President Lines, Ltd.*, 318 U.S. 660, 665-69 (1943); *Fitzgerald v. A.L. Burbank & Co.*, *supra*, 451 F.2d at 679-80. Even if the doctor had been an independent contractor hired by Aztar to discharge the "cure" part of Aztar's duty of maintenance and cure, rather than an employee, Aztar would have been liable, as explained in *id.* at 680. But after admitting in her deposition that she had been seeing a chiropractor about her back before experiencing back pain on board the ship, Greenwell amended her complaint to drop the charge that she had been injured at work and charged instead that Aztar had either directed her

to use the incompetent doctors who operated on her or had fraudulently induced or otherwise improperly compelled her to use them. Under standard tort principles (see, e.g., *Reed v. Bascon*, 530 N.E.2d 417, 420-21 (Ill. 1988)) that are equally applicable to maritime cases, Aztar would be liable, not vicariously but as a negligent actor, if it steered Greenwell to doctors who it knew or should have known were incompetent. *Fitzgerald v. A.L. Burbank & Co.*, *supra*, 451 F.2d at 679; cf. *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1369 (5th Cir. 1988).

That's a big "if." Steering a patient to a doctor who commits malpractice is not itself malpractice or otherwise tortious unless the steerer believes or should realize that the doctor is substandard, and that is not claimed. Yet the district judge, instead of dismissing the malpractice claim on the merits and therefore with prejudice, dismissed it without prejudice. He thought it merely premature, because Greenwell hadn't completed the pre- complaint review procedure to which Indiana subjects claims of medical malpractice. Ind. Code § 34-18-8-4; *Hill v. Porter Memorial Hospital*, 90 F.3d 220, 222 (7th Cir. 1996); *Sherrow v. GYN, Ltd.*, 745 N.E.2d 880, 884 (Ind. App. 2001). The judge also dismissed Aztar's third-party claim against the doctors.

Both dismissals are interlocutory, because the remainder of Greenwell's complaint, consisting of fraud claims against Aztar that invoke the district court's supplemental jurisdiction, 28 U.S.C. § 1367, remains pending in the district court. The general rule in the federal system is that only final judgments are appealable. 28 U.S.C. § 1291. The judge purported to make the dismissals appealable by entering

partial final judgments under Fed. R. Civ. P. 54(b). This was improper with respect to the dismissal of Greenwell's claims. Rule 54(b) can be used only to enter judgment "as to one or more but fewer than all of the claims or parties," with "claim" defined to include all legal grounds that are based on closely related facts. *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 860 F.2d 1441, 1444 (7th Cir. 1988). The retained fraud claims overlap the dismissed claims too closely to satisfy this criterion. In contrast, the dismissal of the third-party claim let the doctors out of the case, thus satisfying the "fewer than all of the . . . parties" provision of Rule 54(b) and making that dismissal a final, immediately appealable judgment. So their appeal is secure.

Now it is true that interlocutory appeals are authorized in admiralty cases by 28 U.S.C. § 1292(a)(3), but this route isn't open to Greenwell either, and for two reasons. First, as we'll see, Greenwell failed to invoke admiralty procedures, *Continental Casualty Co. v. Anderson Excavating & Wrecking Co.*, 189 F.3d 512, 517 (7th Cir. 1999), and second, the only interlocutory appeals that fall within section 1292(a)(3) are those that "determin[e] the rights and liabilities of the parties." This language has been interpreted to exclude procedural orders, *Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 668-70 (7th Cir. 1999) (per curiam); *Sea Lane Bahamas Ltd. v. Europa Cruises Corp.*, 188 F.3d 1317, 1321-22 (11th Cir. 1999), such as the order in this case dismissing Greenwell's claim for failure to exhaust administrative remedies. It's a sensible interpretation. A rule allowing all interlocutory orders to be immediately appealable would flood us with appeals. Anyway the purpose of the special admiralty appeal statute is merely to allow the determination

of liability to be appealed without awaiting the determination of damages, *Beluga Holding, Ltd. v. Commerce Capital Corp.*, 212 F.3d 1199, 1203 (11th Cir. 2000), consistent with the historic admiralty practice (now of course widely imitated in ordinary civil cases as well) of trying liability and damages separately. *Wingerter v. Chester Quarry Co.*, *supra*, 185 F.3d at 670.

That leaves only one route for Greenwell's appeal: the doctrine of pendent appellate jurisdiction. The dismissal of Aztar's third-party complaint against the doctors is appealable by virtue of Fed. R. Civ. P. 54(b), as we have said, and Greenwell's appeal is closely related to it. But after the Supreme Court questioned the existence of the doctrine in *Swint v. Chambers County Commission*, 514 U.S. 35, 43-51 (1995), we turned skittish, describing it as a "controversial and embattled doctrine" in *United States v. Board of School Commissioners*, 128 F.3d 507, 510 (7th Cir. 1997), and invoking it not once in the six years after *Swint* was decided. Yet the doctrine clearly still lives, for it has been invoked by the Supreme Court since *Swint*, in *Clinton v. Jones*, 520 U.S. 681, 707 n. 41 (1997), where the Court said that "the Court of Appeals correctly found that pendent appellate jurisdiction over this issue was proper." Cf. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 770 n. 2 (2000). It has also been invoked by our sister circuits. See *Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes*, No. 00-40088, 2001 WL 902139, at *3 (5th Cir. Aug. 27, 2001); *Streit v. County of Los Angeles*, 236 F.3d 552, 559 (9th Cir. 2001); *In re Stoltz*, 197 F.3d 625, 629 (2d Cir. 1999); *Twelve John Does v. District of Columbia*, 117 F.3d 571, 574-75

(D.C. Cir. 1997). This is an apt case for the use of the doctrine. Greenwell's malpractice claim against Aztar is entwined with Aztar's indemnity claim against the doctors (Greenwell is trying to hold Aztar liable for the doctors' acts, and indemnity depends on whether she succeeds), and since we must decide the latter, we might as well decide the former at the same time and head off a second appeal — so this is one of those cases in which allowing an interlocutory appeal prevents rather than produces piecemeal appeals, while if the liability and indemnity issues did not overlap there would be only a limited economy from deciding them in one rather than two appeals. And though the special admiralty appeal statute is not applicable, it reflects a relaxed view of finality hospitable to a doctrine that enables certain interlocutory orders to be brought up to the court of appeals earlier than they could be in an ordinary civil case. Pendent appellate jurisdiction is that doctrine.

So we can proceed to the merits, where we first observe that the district judge erred in dismissing Greenwell's claim on the basis of the Indiana medical-review statute. The statute governs claims under Indiana law (thus including diversity suits, *Jones v. Griffith*, 870 F.2d 1363, 1367-68 (7th Cir. 1989); *Hines v. Elkhart General Hospital*, 603 F.2d 646-47 (7th Cir. 1979)), not claims under federal law, as correctly noted in *Smith v. Indiana*, 904 F. Supp. 877, 879-80 (N.D. Ind. 1995). The judge should have dismissed the claim, all right, but on the merits.

There is an anterior question, however, of whether Greenwell successfully invoked federal admiralty jurisdiction. Her contention that Aztar violated its duty of

maintenance and cure by steering her to the doctors who operated on her establishes a maritime connection: she's a maritime employee and Aztar a maritime employer. At one time no more would have been necessary to place the case within the admiralty jurisdiction. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531-34 (1995); *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1866). But now a substantial relationship between the alleged tort and some traditional maritime activity must also be shown. *Sisson v. Ruby*, 497 U.S. 358, 364-67 (1990); *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 673-75 (1982); *Mink v. Genmar Industries, Inc.*, 29 F.3d 1543, 1545 (11th Cir. 1994). That element is missing here, just as it would be if Greenwell were complaining that an employee of Aztar had broken into her house and poisoned her goldfish. Remember that it's not argued that Aztar knew or had reason to believe that the doctors were incompetent. The referral was innocent, and the alleged negligence of the doctors unforeseeable. *Jutzi-Johnson v. United States*, No. 00-2411, 2001 WL 1002736 at *2-4 (7th Cir. Sept. 4, 2001); *Beul v. ASSE International, Inc.*, 233 F.3d 441, 447 (7th Cir. 2000). In any event, neither in the goldfish case nor in our case is there enough of a maritime flavor to warrant trundling out a body of law designed to regulate maritime accidents, which is the distinction (between an adventitious and an organic relation to maritime activity) that explains why the Supreme Court added the "substantial relationship" test for determining whether there is admiralty jurisdiction. *Palmer v. Fayard Moving & Transportation Corp.*, 930 F.2d 437, 440 (5th Cir. 1991); *In re Complaint of Paradise Holdings, Inc.*, 795 F.2d 756, 759-60 (9th Cir. 1986). The ordinary law

of medical malpractice is adequate to deal with the consequences of the operation by medical landlubbers on Greenwell's back for a condition that preexisted her maritime employment.

But jurisdiction depends on the facts as they appear when the complaint is filed. *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993); *Mullan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824); *Chicago Typographical Union No. 16 v. Chicago Sun Times, Inc.*, 935 F.2d 1501, 1508 (7th Cir. 1991). Remember that Greenwell initially charged that she had been injured at work. That would have brought the case within range, at least, of the doctrine of maintenance and cure. When she dropped that charge, her claim of maintenance and cure evaporated, because the duty of cure is limited to injuries and illnesses that occur on the job. But it evaporated because of a failure of proof, not because of a failure of jurisdiction.

As for Greenwell's claim under the Jones Act, a claim within the federal-question jurisdiction of the district court, it too evaporated because of facts that emerged after the complaint was filed: that the doctors who operated on her were neither employees of the defendant nor acting on behalf of Aztar, thus eliminating any basis for vicarious liability, and that Aztar was not negligent in selecting them, thus eliminating any basis for holding it directly liable for the consequences of the operation on Greenwell's back. More fundamentally, the Jones Act, like the doctrine of maintenance and cure, *Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129, 132-33 (1959), is limited to injuries that occur "in the course of [the seaman's] employment," 46 U.S.C. App. § 688(a), and Greenwell's did not.

Appendix A

The district judge mistakenly thought that Greenwell had a viable federal admiralty or Jones Act claim, just one that was premature. Let us now consider whether he was also mistaken in believing that Aztar could not implead the doctors under the admiralty impleader rule, Fed. R. Civ. P. 14(c), a rule "designed to expedite and consolidate admiralty actions by permitting a third- party plaintiff to demand judgment against a third-party defendant in favor of the plaintiff." *Texaco Exploration & Production Co. v. AmClyde Engineered Products Co.*, 243 F.3d 906, 910 (5th Cir. 2001). "In an admiralty suit, once a defendant impleads a third party in an effort to shift the burden of liability in whole or part from its own shoulders, and demands judgment in favor of the original plaintiff against that third party, the suit proceeds as if the original plaintiff had sued the third party." *Rodi Yachts, Inc. v. National Marine, Inc.*, 984 F.2d 880, 882 (7th Cir. 1993). The peculiar urgency of many admiralty cases explains the rule. Admiralty proceedings typically are in rem, meaning that, through the fiction that the ship itself is the defendant, the ship is made security for the payment of any damages assessed against its owner; it might be too difficult to obtain jurisdiction over the owner, who might be thousands of miles away. Oliver Wendell Holmes, Jr., *The Common Law* 28 (1881). But with the right to seize the ship to secure the payment of damages comes a correlative obligation on the part of the court to expedite the case so that the ship isn't held in port indefinitely with its cargo rotting or otherwise going to waste, or is allowed to sail away beyond the court's reach.

The district judge's ground for refusing to permit Aztar to use Rule 14(c) was that Greenwell had failed to designate

her claim as an admiralty claim under Fed. R. Civ. P. 9(h). Rule 14(c) permits its special impleader procedure (as well as the special statute permitting certain interlocutory appeals in admiralty cases) only "when a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h)." The distinction is between a case being within the admiralty jurisdiction and the special admiralty procedures being applicable to the case.

So we go to Rule 9(h) and discover there that a pleading which sets forth a claim for relief that is within both the admiralty jurisdiction and some other grant of federal jurisdiction, as is the case here (where there is both a maintenance and cure claim and a Jones Act claim), "may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rule 14(c) [and other special admiralty rules]." The purpose is to enable the plaintiff to notify his opponent and the court that he's invoking those rules, *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 206 (1st Cir. 1988); *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249, 1252-54 (5th Cir. 1975), when, having another basis for federal jurisdiction, he could just rely on the ordinary civil rules. If he doesn't so indicate, by means of the statement or otherwise, *Wingerter v. Chester Quarry Co.*, *supra*, 185 F.3d at 665-68; *Foulk v. Donjon Marine Co.*, 144 F.3d 252, 256 (3d Cir. 1998); *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 345 (5th Cir. 1991) (per curiam), the case proceeds under the ordinary civil rules. Since the plaintiff by thus forgoing the use of the admiralty rules surrenders whatever advantages he might derive from them, there is no reason to permit the defendant to invoke them either.

See *Foulk v. Donjon Marine Co., supra*, 144 F.3d at 257 n. 4; *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 987 (5th Cir. 1978).

But all this is supremely unimportant in this case. For the significance of Rule 14(c) is that it permits the plaintiff to obtain relief directly from the third-party defendant, cutting out the middleman, the third- party plaintiff. If the third-party plaintiff, Aztar here, is not seeking to bow out, but is content to remain the middleman, paying the plaintiff if she obtains a judgment and then turning around and seeking reimbursement from the third-party defendants, rather than, as Rule 14(c) permits, substituting the third-party defendants (the doctors, in this case) for itself, it can use Rule 14(a), the ordinary impleader rule. Rule 14(c) drops out of the picture, see *In re Oil Spill by Amoco Cadiz*, 699 F.2d 909, 913 (7th Cir. 1983), and with it any concern related to Rule 9(h), to which Rule 14(a) naturally does not refer. And Rule 14(a) can be used in admiralty suits as well as in ordinary federal civil suits. *Seal Offshore, Inc. v. American Standard, Inc.*, 777 F.2d 1042, 1045 (5th Cir. 1985); *McCune v. F. Alioto Fish Co.*, 597 F.2d 1244, 1246 (9th Cir. 1979).

This point is academic too, however, because Greenwell's malpractice claim (maintenance and cure and Jones Act) has to be dismissed and with it goes any claim by the malpractice defendant (Aztar) against third parties. The remaining significance of the cross-appeal is that without it Aztar could not ask us to modify the judgment in its favor against Greenwell to make it a judgment on the merits dismissing her malpractice claim with prejudice rather than a procedural order dismissing it without prejudice.

Appendix A

El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 479-82 (1999); *Conover v. Lein*, 87 F.3d 905, 908 (7th Cir. 1996); *Bell, Boyd & Lloyd v. Tapy*, 896 F.2d 1101, 1104 (7th Cir. 1990); *Engleson v. Burlington Northern R.R.*, 972 F.2d 1038, 1042 (9th Cir. 1992).

The district court's judgment is modified to place dismissal of the malpractice claim on the merits, and as so modified is affirmed. Because the claims over which the district court had original jurisdiction have thus dropped out before trial, the court will almost certainly want to dismiss the plaintiff's supplemental claims as well. See 28 U.S.C. § 1367(c)(3). But that is a judgment for that court to make in the first instance.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ENTRY ON THIRD-PARTY DEFENDANTS' MOTIONS TO DISMISS AND JUDGMENT DATED SEPTEMBER 21, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EV 98-0211-C-Y/H
Consolidated Case

JANET GREENWELL,

Plaintiff,

vs.

AZTAR INDIANA GAMING CORPORATION
d/b/a AZTAR CASINO,

Defendant,

AZTAR INDIANA GAMING CORPORATION
d/b/a AZTAR CASINO,

Plaintiff,

vs.

JANET GREENWELL,

Defendant,

Appendix B

AZTAR INDIANA GAMING CORPORATION
d/b/a AZTAR CASINO,

Third-Party Plaintiffs,

vs.

GREGORY J. LOOMIS, M.D. and
MATTHEW B. KERN, M.D.,

Third-Party Defendants.

ENTRY ON THIRD-PARTY DEFENDANTS' MOTIONS TO DISMISS

I. Introduction

This matter comes before the court on both third-party defendant, Gregory J. Loomis, M.D.'s ("Dr. Loomis") motion to dismiss and third-party defendant Matthew B. Kern, M.D.'s ("Dr. Kern") motion to dismiss for lack of jurisdiction and/or failure to state a claim pursuant to Rules 12(b)(1) and 12(b)(6), respectively (collectively, "the motions"). FED. R. CIV. P. 12(b)(1), 12(b)(6).

This case was initiated when plaintiff Janet Greenwell ("Greenwell") filed an amended complaint against defendant, Aztar Indiana, Gaming Corporation d/b/a Aztar Casino ("Aztar"), alleging that Aztar's negligence and the negligence of its alleged agents, Dr. Loomis and Dr. Kern, resulted in injuries to Greenwell's back. In Aztar's answer to the complaint, Aztar denies that the doctors are its "agents."

Aztar subsequently filed a third-party complaint against the doctors for indemnification and contribution for any and all damages Aztar maybe liable for in the underlying litigation filed by Greenwell. The third-party defendant doctors now move to dismiss the third-party complaint for lack of jurisdiction and failure to state a claim upon which relief can be granted. For the reasons that follow, the court finds the doctors' motion to be well taken and it is hereby granted.

II. Standard of Review

When considering a motion to dismiss pursuant to Rule 12(b)(6), the court examines the sufficiency of the complaint, not the merits of the lawsuit. *Demitropoulos v. Bank One Milwaukee, N.A.*, 915 F.Supp. 1399, 1406 (N.D. Ill. 1996) (citing *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990)). A court should dismiss a complaint for failure to state a claim only if it appears to a legal certainty that the plaintiff would not be entitled to relief under any set of facts. *Hamlin v. Vaudenberg*, 95 F.3d 580 (7th Cir. 1996). In other words, a dismissal is proper only where the plaintiff can prove no set of facts that would entitle him to relief. *Mallett v. Wisconsin Div. of Vocational Rehabilitation*, 130 F.3d 1245, 1248 (7th Cir. 1997); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In making its determination, the court shall accept all the facts in the complaint and supporting documents as true and draw all reasonable inferences in favor of the plaintiff. *Mallett*, 130 F.3d at 1248; *Porter v. DiBlasio*, 93 F.3d 301, 305 (7th Cir. 1996); *Whirlpool Fin. Corp. v. GN Holdings, Inc.*, 67 F.3d 605 (7th Cir. 1995).

Appendix B

III. Discussion

After reviewing the parties' briefs and reviewing the law, it appears that the only case on point is a Louisiana District Court case, *Harrison v. Glendal Drilling Co.*, 679 F. Supp. 1413. The court finds the *Harrison* case to be persuasive as it appears, from the published case law, that Louisiana courts hear the vast majority of maritime and admiralty claims and therefore are familiar and knowledgeable of the unwieldy field of admiralty law.

The *Harrison* case featured a scenario similar, to the one presented here: plaintiff was injured on a vessel and brought a Jones Act claim against his employer, the vessel owner; the defendant, employer asserted a third-party indemnification or contribution claim against the plaintiffs treating doctor; and the third-party defendant doctor moved to dismiss the third-party complaint for lack of subject matter jurisdiction, or alternatively, for failure to state a claim. Likewise, the *Harrison* third-party defendant doctor argued that the defendant had not complied with the state medical malpractice act and the defendant argued that their claim was for indemnity and contribution are maritime in nature and therefore set forth an independent basis for jurisdiction under admiralty law not state law. The *Harrison* court decision, which forms the basis of this court's decision, made the following conclusions in regard to federal subject matter jurisdiction and state medical malpractice law.

Appendix B

A. Subject Matter Jurisdiction Under Rule 14(c)

Rule 14(c)[1] permits a defendant to implead a third-party in cases where the initiating plaintiff asserted an admiralty claim pursuant to Rule 9(h)2. FED. R. CIV. P. 14(c) and 9(h). Thus, plaintiff must explicitly assert her claim as a Rule 9(h)[2]

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1. Rule 14(c) provides:

> (c) Admiralty and Maritime Claims. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

FED. R. CIV. P. 14(c).

2. Rule 9(h) provides:

> These rules shall not be construed to extend, or limit the jurisdiction of the United States district courts or the

(Cont'd)

or must assert a claim where "admiralty jurisdiction is the *only* basis for federal subject matter jurisdiction" in order for the defendant to be permitted to bring in a third party via Rule 14(c). *Harrison*, 679 F.Supp. at 1417 (emphasis added). In other words, "[u]nder Rule 9(h), no specific 'identifying, statement' is necessary '[i]f the claim is cognizable only in admiralty.'" *Id.* at 1418 (alteration in original). But, if the plaintiff's complaint includes both an admiralty claim and some other basis for jurisdiction, then such an "identifying statement" is required to invoke a Rule 14(c) third-party claim. *Id.* The Fifth Circuit, the circuit which hears appeals from Louisiana District courts, has noted that when a plaintiff bases her claim on the Jones Act and general maritime law with a jury demand[3], but the plaintiff does not expressly identify her claim with a Rule 9(h) declaration, the claim is not properly identified as admiralty, therefore, the defendant cannot invoke Rule 14(c). *Lirette v. Popick Bros, Water Transport, Inc.*, 699 F.2d 725, 726 n.6 (5th Cir. 1983); *Smith v. Pinell*, 597 F.2d 994, 996-97 n.2 (5th Cir 1979) (citing *Banks v. Hanover Steamship Corp.*, 43 F.R.D. 374, 376-77 (D.Md. 1967).

(Cont'd)

> venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93.

FED. R. CIV. P. 82 .

3. Trials by jury are not available under admiralty law. *Harrison*, 679 F. Supp. at 1418.

Like the plaintiff in *Harrison*, Greenwell made a Jones Act claim providing the court with federal question jurisdiction; she demanded a trial by jury, which is not permitted in admiralty law, in her Amended Complaint; and she did not make a Rule 9(n) declaration. *Harrison*, 676 F.Supp. at 1419. Therefore, Greenwell's claim cannot be categorized as a Rule 9(h) claim. *Smith*, 597 F.2d at 996-96; *Harrison*, 679 F.Supp. at 1419; *Banks*, 43 F.R.D. at 376-77. Accordingly, Aztar cannot implead a third party via Rule 14(c) as Rule 14(c) may only be invoked when a plaintiff makes a Rule 9(h) claim. *Id.* Rule 14(c) does not provide jurisdiction for Aztar's third-party, complaint.

B. Supplemental Jurisdiction (28 U.S.C. § 1367)

Defendant Aztar argues, in the alternative, that the federal court has jurisdiction over its third-party claim under the doctrine of supplemental jurisdiction. 28 U.S.C. § 1367. The court will, therefore, address the applicability of supplemental jurisdiction in this case.

When independent jurisdiction, such as admiralty jurisdiction, does not exist, often supplemental jurisdiction is available over all claims so related to the claim over which there is original jurisdiction that they form part of the same case or controversy. 28 U.S.C. § 1367. Federal courts have discretion to decline jurisdiction over a state law claim, particularly if the state law claim predominates. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (concluding that ancillary jurisdiction is a "doctrine of discretion"; "Its justification lies in the considerations of judicial economy, convenience[,] and fairness to the litigants; if these

are not present, a federal court should hesitate to exercise jurisdiction over state claims."). For example, if a defendant makes third-party indemnification claims that are not independently cognizable under federal admiralty jurisdiction, then the third-party claim is not deemed to be a maritime claim and, therefore, it must be adjudicated under state law of contribution and indemnity, making it a state law claim. *Harrison*, 679 F.Supp. at 1421.

In order to invoke supplemental jurisdiction over state law claims, as a constitutional minimum, "the state and federal claims must derive from a common nucleus of operative facts." *Gibbs*, 383 U.S. at 726. As to be discussed below, the court finds that no common nucleus of operative facts exist between Greenwell's main claims and Aztar's third-party claims.

Again this court looks to the *Harrison* case for guidance. Like in Harrison, "[a]s regards quantum, there is arguably a common nucleus: both claims concern plaintiff's injury, [allegedly] sustained either as a result of negligence of the defendant[], or Dr. [Kem and Dr. Loomis], or both. . . . such a factual connection is not sufficient to satisfy the constitutional requirements necessary to invoke our ancillary jurisdiction." 676 F.Supp. 1423. The reasoning is that the federal and state claims have no factual similarities as the federal claim: "The disparate legal theories, Jones Act negligence and unseaworthiness on one hand, and medical malpractice on the other, reflect this lack of similarity in the operative facts before us." *Id.* at 1423.

Aztar pointed out in its brief that Harrison involved slightly different facts than the case at bar because the plaintiff and defendant settled the Jones Act claim and only the medical malpractice issue was before the court; however, Harrison did indicate that even if the federal claim had not settled, it still would refuse to hear the medical malpractice claim: "Permitting impleader and trying defendant[']s[] medical malpractice claim together with plaintiff s unrelated maritime claims would not promote judicial efficiency." *Id.* 1423.

As there is no sufficient common nucleus of facts between the state and federal law claims, this court declines to exercise jurisdiction over the state law claims. Therefore, both third-party defendants' motions to dismiss are granted. The parties should not be prejudiced with this dismissal as no extensive proceedings have commenced: there has been little discovery and what has been done can be used in a state case and there has been no trial in this case.

C. Failure to State a Claim/State Medical Malpractice Law

Even if this court exercised jurisdiction over the supplemental claims, the court would be acting prematurely as explained below.

Indiana law requires that prior to bringing an action against a health care provider in court, the claimant must present the proposed complaint before a medical review panel and the panel must render an opinion. IND. CODE 34-18-8-4. The only exceptions to this rule are: (1) when all parties including the

defendant doctor agree in writing to waive the medical review panel prerequisite to trial, (IND. CODE 34-18-8-5), and (2) when the plaintiff is claiming less than $15,000 in damages (IND. CODE 34-18-8-6). Neither exception has been satisfied in this case.

1. Third-Party Plaintiff Aztar's Complaint

In order for the court to rule on Aztar's indemnification claim, it would be called upon to determine the merits of a medical malpractice claim before a proper claim of medical malpractice is brought before a medical review panel pursuant to Indiana law. It would not be proper for this court, a federal court, to adjudicate a medical malpractice allegation by circumventing Indiana's medical malpractice statute.

Although the Indiana Department of Insurance, the agency that oversees the Indiana Medical Malpractice Act, found the Indiana Medical Malpractice Act inapplicable to the third-party complaint, the underlying complaint upon which the third-party complaint is based does set forth a medical-malpractice claim. The court has not been called upon to determine the validity of that claim. However, at this time, allowing the third-party complaint to proceed would be premature as it would require the court to determine whether the doctors committed medical malpractice. Until the proper channels are followed under the medical malpractice statutes, this court will not make a determination as to whether the doctors committed malpractice. Accordingly, third-party defendants Dr. Loomis' and Dr. Kern's motions to dismiss are **granted**.

Appendix B

2. Plaintiff Greenwell's Amended Complaint

It has come to the court's attention, through Dr. Kern's Brief in Support of the Motion to Dismiss, that Greenwell has in fact filed a complaint before the Indiana Department of Insurance and the review process has commenced. As Greenwell has not met her prerequisites to jurisdiction for her medical malpractice claim, the court **sua sponte dismisses without prejudice** Greenwell's medical malpractice claim, Count II of her Amended Complaint.

IV. Conclusion

For the reasons set forth above, the court finds that third-party, defendant Dr. Loomis' motion to dismiss and third-party defendant Dr. Kern's motion to dismiss are both hereby granted. In addition, the court declines to exercise supplemental jurisdiction over Greenwell's medical malpractice claims as detailed above; therefore, the court **sua sponte dismisses without prejudice** Count II (Malpractice) of Greenwell's Amended Complaint. The medical malpractice claim as well as Aztar's third-party contribution and/or indemnification claim should be heard in state court if the plaintiff so chooses to continue her claim after the medical review panel renders its opinion. This court will continue to exercise jurisdiction over Greenwell's Jones Act and related negligent representation and fraud claims against Aztar because cognizable independent federal jurisdiction exists as to these claims. There be no just reason for delay, the court directs entry of **final judgment to dismiss without prejudice** Greenwell's medical malpractice claim, Count II of her Amended Complaint.

Appendix B

It is so ordered this 21 day of September 2000.

s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana
Evansville Division

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EV 98-0211-C-Y/H
Consolidated Case

JANET GREENWELL,

Plaintiff,

vs.

AZTAR INDIANA GAMING CORPORATION
d/b/a AZTAR CASINO,

Defendant,

AZTAR INDIANA GAMING CORPORATION
d/b/a AZTAR CASINO,

Plaintiff,

vs.

JANET GREENWELL,

Defendant,

Appendix B

AZTAR INDIANA GAMING CORPORATION
d/b/a AZTAR CASINO,

Third-Party Plaintiffs,

vs.

GREGORY J. LOOMIS, M.D. and
MATTHEW B. KERN, M.D.,

Third-Party Defendants.

JUDGMENT

The court, having this day made its Entry and finding no just reason for delay,

IT IS THEREFORE ADJUDGED that third-party defendant Dr. Gregory J. Loomis' motion to dismiss and third-party defendant Dr. Matthew B. Kern's motion to dismiss are both **granted** and thus Aztar Indiana Gaming Corporation's third-party complaint against both Dr. Loomis and Dr. Kern is hereby **ORDERED DISMISSED**. In addition, it is **ADJUDGED, ORDERED AND DECREED** that Count II (malpractice claim) of plaintiff Janet Greenwell's amended complaint against defendant Aztar is now **DISMISSED WITHOUT PREJUDICE**, for lack of subject matter jurisdiction.

This is a Final Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Appendix B

It is so ordered this 21 day of September 2000.

s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana
Evansville Division

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED NOVEMBER 16, 2001

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

November 16, 2001

Before

Hon. Thomas E. Fairchild, *Circuit Judge*

Hon. William J. Bauer, *Circuit Judge*

Hon. Richard A. Posner, *Circuit Judge*

No. 00-3879

JANET GREENWELL,

Plaintiff-Appellant,

v.

AZTAR INDIANA GAMING CORPORATION, doing business as AZTAR CASINO,

Defendant-Third/Party Plaintiff-Appellee,

v.

MATTHEW B. KERN, Doctor and GREGORY J. LOOMIS,

Third/Party Defendants-Appellees.

Appendix C

Appeal from the United States District Court
for the Southern District of Indiana, Evansville Division

No. 98 C 211

Richard L. Young,
Judge.

ORDER

On October 18, 2001 plaintiff-appellant filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore **DENIED**.